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Supreme Court, U.S.
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No. 97-13

In The
Supreme Court of the United States

October Term 1997

SALLY W. DREW,
JUDY MAYO,

Petitioners,

v.

RICOH CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**Reply Brief in Support of
Petition for Writ of Certiorari**

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Respondent's Brief in Opposition to Petition for Certiorari is flawed in several respects.

The Circuit Courts of Appeal are Split As To Whether "Motivating Factor" Is The Correct Standard For Liability In All Title VII Discrimination Cases

Respondent attempts to confuse the issues when it calls a jury instruction in accordance with the liability standard set out in 42 U.S.C. § 2000e-2(m) a "mixed motive" instruction. Such instruction is more properly labeled the "motivating factor" instruction. The issue is whether the motivating factor standard set out in Section 2000e-2(m) is the only standard for liability in a disparate treatment discrimination case, not whether courts continue to use the "mixed motive" and "pretext" analysis in relation to remedies.

Respondent mischaracterizes the holding of *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116 (2nd Cir. 1997). In that case, the court held that, although the plaintiff had not presented direct evidence of discrimination, he needed to show only that "the prohibited factor was at least one of the motivating factors in the adverse employment decision." *Fields* at 121. The is directly contrary to the holding of the Fourth Circuit in this case.

The use of the term "dual motivation" in Respondent's brief is deceptive. The part of the *Fields* opinion that Respondent quotes at length did not deal with the issue of whether the plaintiff was entitled to a "motivating factor" instruction. That part of the opinion discussed the refusal of the trial court to give an instruction on the employer's affirmative defense that it would have taken the same action in the absence of the impermissible factor, pursuant to 42 U.S.C. § 2000e-5(g)(2)(B), which the court called the "dual motivation instruction." The plaintiff had requested the instruction, and the defendant had objected. The Second Circuit held that the plaintiff was not "entitled to have the jury informed of an affirmative defense not desired by the defendant" in the absence of direct evidence. *Fields* at 123-124. Thus the "dual motive instruction" at issue in *Fields* pertained only to remedy and not to liability. Accordingly, that portion of the decision sheds no light on the issue before this Court.[1] *See also, Renz v. Grey Advertising,* 1997 U.S. App. LEXIS 19993, n.5 (2nd Cir. August 4, 1997) ("a Title VII or ADEA plaintiff proves discrimination by demonstrating that race, gender, or age played a motivating role in the employer's decision.")

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[1] Respondent also misrepresents the Eleventh Circuit's holding in *Harris v. Shelby County Board of Education,* 99 F.3d 1078, 1084 (11th Cir. 1996). In that case, at footnote 2, the court explicitly held that the plaintiff presented only circumstantial evidence of discrimination. Nevertheless, the court held that the plaintiff need only prove that his race was a motivating factor in order to obtain some limited relief. Thus, *Harris* stands in direct conflict with the Fourth Circuit.

This is an Appropriate Case for Review

In arguing that this is not an appropriate case for review, Respondent again is misleading. It seriously mischaracterizes the findings of the District Court, which were affirmed on appeal. The District Court did not hold that the Petitioners had not presented "legally sufficient evidence" that their sex was a motivating factor in the contested employment decision, as Respondent asserts. (Opposition at 15). Rather, the District Court concluded that the Petitioners did not present "sufficient direct evidence" of discrimination to qualify for the motivating factor instruction.[2] (11A). The District Court did not extinguish the jury's finding that gender discrimination was a motivating factor in the adverse employment actions. The fact that the jury found that gender discrimination was a motivating factor in Respondent's actions makes this an ideal case for Supreme Court Review.

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[2] The District Court granted judgment to Respondent because it concluded that the jury's finding that the Respondent would have taken the same actions absent consideration of the impermissible factor was equivalent to a finding that sex was not a "determinative factor."

CONCLUSION

For the reasons set forth above and in the Petition, this Honorable Court should grant certiorari and reverse the holding below

Respectfully submitted,

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